Windsor Aims Construction Sdn Bhd v MNQ Builder Sdn Bhd & Ors

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22NCVC-129–08 OF 2015
COLLIN SEQUERAH JC
6 JUNE 2016

Contract — Agreement — Joint venture agreement — Parties agreed to enter into joint venture — Machines were parked by defendant's premises — Joint venture broke down — Plaintiff sought recover machines together with arrears of rental of machines — Whether machines ought to be returned before trial of action — Whether court ought to grant mandatory injunction — Whether rental for machines could be recovered by way of interlocutory application

The plaintiff was involved in the business of supply, industry and construction. The plaintiff and the first defendant agreed to a joint venture agreement ('JVA'). The second and third defendants were the directors of the first defendant. The first defendant supplied crusher run, an unconsolidated mixture of rock fragments, to the plaintiff. The plaintiff was desirous of commencing a 'crushing plant' on a joint venture basis with the first defendant. The plaintiff issued a 'Guarantee/Parking of Machines' letter to the first defendant relating five machines ('the said machines'). The said 'Guarantee/Parking of Machines' was expressed to be in consideration of the first defendant's agreement to enter into a joint venture with the plaintiff. It was also expressed to be an act of good faith and to increase the first defendant's confidence in the plaintiff. The said machines were parked by the plaintiff's with the first defendant in order that the latter would agree to into a joint venture with the plaintiff. A dispute arose between the parties and the joint venture broke down. The plaintiff filed this suit to, inter alia, recover the machines together with arrears of rental of the said machines. The first defendant filed a counterclaim for, inter alia, special damages for the sale of crusher run to the plaintiff and rental of excavators and mobile crusher as well as damages for breach of the JVA. The issues that arose were whether the said machines ought to be returned to the plaintiff before the trial of this action; whether the court could grant a mandatory injunction when the effect would be to grant the plaintiff substantially the whole relief claimed for in the suit; and whether the plaintiff could recover rental for the said machines by way of this interlocutory application.

Held, granting the order in terms with costs:

(1) As the ownership of the machines were not in dispute and as the JVA had irretrievably broken down, the very reason for the machines remaining in the custody of the defendant's no longer exists. Although this would amount to granting part of the relief claimed in the suit filed by the plaintiff, and as the machines, by the defendants own admission, were not being used by them, it should be returned to the plaintiff (see para 25).

(2) Despite the contention of the defendant's that part of the reason for the parking of the machines was as security for the debt owed by the plaintiff to the first defendant, upon a perusal of the 'Guarantee/Parking of Machines' letter, there was no such term contained therein. The 'Guarantee/Parking of Machines' letter further stipulated in cl (viii) that the plaintiff may at any time retract or withdraw the machines. The issue of preserving the status quo did not arise as the JVA had irretrievably broken down and therefore the machines were no longer required for its due performance (see paras 26–27).

(3) To allow the defendants to keep the machines would serve no purpose other than to perhaps act as leverage against the plaintiff if at all, in an attempt to settle the alleged debt. As the plaintiff was the undisputed owner of the machines, it was fairly certain that the outcome at the trial of this action would also result in the machines being returned to the plaintiff irrespective of the final outcome. This therefore brought this case within the category of cases in which a strong and arguable case existed for the return of the machines to them (see para 28).

[Bahasa Malaysia summary

Plaintif telah terlibat dalam perniagaan bekalan, industri dan pembinaan. Plaintif dan defendan pertama telah bersetuju kepada perjanjian usaha sama ('PUS'). Defendan-defendan kedua dan ketiga adalah pengarah-pengarah defendan pertama. Defendan pertama telah membekalkan 'crusher run', gabungan cebisan batu-batan, kepada plaintif. Plaintif dengan giat telah memulakan 'crushing plant' atas dasar usaha sama dengan defendan pertama. Plaintif telah mengeluarkan surat 'Guarantee/Parking of Machines' kepada defendan pertama berhubung lima mesin ('lima mesin tersebut'). 'Guarantee/Parking of Machines' itu dengan nyata adalah balasan untuk perjanjian defendan pertama memasuki usaha sama dengan plaintif. Ia juga dinyatakan sebagai satu tindakan berniat baik dan untuk meningkatkan keyakinan defendan pertama dalam plaintif. Mesin-mesin tersebut telah diletakkan oleh plaintif dengan defendan pertama bagi tujuan agar defendan pertama bersetuju dengan usaha sama bersama plaintif. Satu pertikaian telah timbul antara pihak-pihak tersebut dan usaha sama itu gagal. Plaintif telah memfailkan guaman ini untuk, antara lain, mendapat balik mesin-mesin tersebut bersama dengan hutang sewa mesin-mesin tersebut. Defendan pertama telah memfailkan tuntutan balas untuk, antara lain, ganti rugi untuk

jualan 'crusher run' itu kepada plaintif dan sewaan penggerudi dan 'mobile crusher' dan juga ganti rugi untuk pelanggaran PUS tersebut. Isu-isu yang timbul adalah sama ada mesin-mesin tersebut patut dikembalikan kepada plaintif sebelum perbicaraan tindakan ini; sama ada mahkamah patut memberi injunksi mandatori walhal kesannya adalah untuk memberi plaintif keseluruhan substantial relief yang dituntut dalam guaman itu; dan sama ada plaintif boleh mendapat balik sewa untuk mesin-mesin tersebut melalui permohonan interlokutori.

Diputuskan, memberikan perintah mengikut terma dengan kos:

(1) Memandangkan pemilikan mesin-mesin tersebut tidak dipertikaikan dan oleh kerana PUS itu telah gagal, adalah sebab untuk mesin-mesin tersebut tidak lagi kekal dalam jagaan defendan. Walaupun ini seperti memberikan sebahagian daripada relief yang dituntut dalam guaman yang difailkan oleh plaintif, dan oleh kerana mesin-mesin tersebut, melalui pengakuan defendan-defendan sendiri, tidak digunakan oleh mereka, ia patut dikembalikan kepada plaintif (lihat perenggan 25).

(2) Walaupun hujah defendan bahawa sebahagian daripada sebab untuk meletakkan mesin-mesin tersebut sebagai jaminan untuk hutang yang perlu dibayar oleh plaintif kepada defendan pertama, setelah meneliti surat 'Guarantee/Parking of Machines', tiada terma sedemikian yang terkandung dalamnya. Surat 'Guarantee/Parking of Machines' selanjutnya menyatakan dalam klausa (viii) bahawa plaintif boleh pada bila-bila masa mengambil balik atau menarik balik mesin-mesin tersebut. Isu mengekalkan status quo tidak timbul kerana PUS telah gagal dan oleh itu mesin-mesin tersebut tidak lagi diperlukan untuk pelaksanaannya (lihat perenggan 26–27).

(3) Dengan membenarkan defendan-defendan menyimpan mesin-mesin tersebut tidak bermakna selain bertujuan untuk mungkin bertindak sebagai kawalan terhadap plaintif jika apa pun, dalam satu percubaan untuk menyelesaikan hutang yang dikatakan itu. Oleh kerana plaintif adalah pemilik yang tidak dipertikaikan untuk mesin-mesin tersebut, ia agak pasti bahawa keputusan perbicaraan tindakan ini juga akan menyebabkan mesin-mesin tersebut dikembalikan kepada plaintif tanpa menghiraukan keputusan akhir. Oleh demikian ini menjadikan kes ini dalam kategori kes yang kukuh dan boleh dihujahkan untuk pengembalian mesin-mesin tersebut kepada mereka (lihat perenggan 28).]

Notes

For cases on agreement in general, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3255–3345.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316, HL (not folld)
Datuk Johari Abdul Ghani & Ors v QSR Brands Bhd & Ors [2007] 4 MLJ 19; [2007] 1 CLJ 85, CA (refd)
MBf Holdings Bhd v East Asiatic Co (Malaysia) Bhd [1995] 3 MLJ 49, HC (refd)
Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd [1987] 2 MLJ 192, SC (refd)

Legislation referred to

Rules of Court 2012 O 29
Specific Relief Act 1950 ss 51(1), 53

Amit Singh Penesar (Teja Singh Penesar & Co) for the appellant.
Gay Choon Hee Jimmy (Ismail Khoo & Assoc) for the respondent.

Collin Sequerah JC:

INTRODUCTION

[1] The defendant's abovenamed have filed an appeal to the Court of Appeal only against part of the decision given by this court on 17 March 2016 which ordered the defendant's to deliver certain machines to the plaintiff within 30 days of the date of the decision. These grounds of decision therefore only addresses that part of the order appealed against.

[2] By way of application (encl 5) pursuant to O 29 of the Rules of Court 2012 ('the RC') and ss 51(1) and 53 of the Specific Relief Act 1950 ('the SRA'), the plaintiff had sought, inter alia, the following reliefs:

(a) that the defendant's do deliver up the machines specified in the application within seven days from date of the order; and

(b) that the defendant's do pay the rental for the said machines from April 2014.

BACKGROUND FACTS

[3] The background facts that led to the filing of this application are set out as follows. The plaintiff is a company that involved in the business of supply, industry and construction. The plaintiff together with the first defendant agreed to a joint venture agreement (joint venture agreement dated 7 August 2014 ('JVA')). The second and third defendant are the directors of the first defendant.

[4] The first defendant had been supplying crusher run to the plaintiff. A crusher run is an unconsolidated mixture of rock fragments. The plaintiff was desirous of commencing a 'Crushing Plant' on a joint venture basis with the first defendant on Lot 5784 Mukim 12, Batu Maung, Daerah Barat Daya ('Lot 5784').

[5] The plaintiff issued a 'Guarantee/Parking of Machines' by way of letter dated 12 February 2014 to the first defendant. The five machines are as follows:

(a) one unit Volvo SD 100DC compactor BKY 4431 (No 32);

(b) one unit Sumitomo SH-240-5 Excavator BLK 2187 (No 42);

(c) one unit Sumitomo SH-240-5 Excavator BLK 3090 (No 43);

(d) one unit Sumitomo SH-330-5 Excavator BKX 1109 (No 26); and

(e) one unit Sumitomo SH-330-5 Excavator BLM 758 (No 27).

[6] The said 'Guarantee/Parking of Machines' was expressed to be in consideration of the first defendant's agreement to enter into a joint venture with the plaintiff in setting up and jointly operating and managing the crushing plant at Lot 5784. It was also expressed to be an act of good faith and to increase the first defendant's confidence in the plaintiff despite certain rumours circulating in the market.

[7] The said machines were therefore parked or placed by the plaintiff's with the first defendant in order that the latter would agree to into a joint venture with the plaintiff. A dispute had subsequently arisen between the plaintiff and the defendant's and the joint venture has since broken down. The plaintiff has now filed this suit to, inter alia, recover the machines together with arrears of rental of the said machines. The first defendant has filed a counterclaim for, inter alia, special damages for the sale of crusher run to the plaintiff and rental of excavators and mobile crusher as well as damages for breach of the JVA dated 7 August 2014. The plaintiff filed the instant application (encl 5) to, inter alia, recover the machines and for rental for the said machines from April 2014.

[8] The issue to be determined by this court therefore is whether the said machines ought to be returned to the plaintiff before the trial of this action and whether the court can grant a mandatory injunction when the effect would be to grant the plaintiff substantially the whole relief claimed for in the suit. A related issue is whether the plaintiff can recover rental for the said machines by way of this interlocutory application.

CONTENTIONS OF PARTIES

The plaintiff

[9] The plaintiff submitted that the ownership of the machineries is not disputed. The defendants in all of their affidavits have not denied the ownership of the machineries. What was contended by the defendant's is that they have decided to keep the machineries due to the 'alleged debt' the plaintiff owes them.

[10] What the plaintiff prays for is in line with what is stated in the 'Guarantee/Parking of Machines' dated 12 February 2014. The said letter states that the machineries are only to be used for the crushing plant located at Lot 5784, Mukim 12, Batu Maung, Daerah Barat Daya, Pulau Pinang. Any other usage besides what was stated would be deemed to be personal usage or benefit at the defendant's expense. Thus, the defendants are subject to payment of the rental fee as stated in cl (iv) of the letter of guarantee. The plaintiff is therefore entitled to claim for the rental fees of the machineries.

[11] The plaintiff submits that being the owner of the machineries, the plaintiff is deprived of the right and enjoyment of ownership. The plaintiff suffers from the loss of income and opportunity because of the deprivation to access the machineries. The defendants have benefitted and are continuing to benefit from the possession of the machines.

[12] The plaintiff by its representative had inspected the parking site as stated in the letter of guarantee 12 February 2014 and found out that two of the machineries have gone missing. The plaintiff has lodged a police report regarding this and the said report is exhibited in the plaintiff's affidavit.

The defendant's

[13] The defendant's submitted that the plaintiff issued the 'Guarantee/Parking of Machines' dated 12 February 2014 to convince the first defendant to be a joint venture partner. In reliance on the said 'Guarantee/Parking of Machines' and the assurances given by the plaintiff, the first defendant executed a joint venture agreement dated 7 August 2014 ('the said JVA').

[14] It was a term of the JVA that if either party intended to purchase the product of the crushing plant for its own use, a 15% discount would be given from the agreed sale price under the said JVA. However, in breach of the said JVA, when the first defendant attempted to purchase the product for its own

use, the plaintiff refused to allow it the agreed discount and the first defendant issued a notice dated 30 October 2014 in this regard.

[15] It was only after the issuance of the said notice by the first defendant that the plaintiff did for the first time demand payment of rental for the machines on 11 November 2014. Arising from that, the plaintiff then barred the first defendant from entering Lot 5784 and then issued notice dated 11 November 2014 for return of the machines under the 'Guarantee/Parking Agreement' together with seven months rent for the said machine.

[16] The defendant's submitted that the plaintiff's case is not one that is unusually strong and clear for the court to grant an interlocutory mandatory injunction. The machines were delivered to the first defendant by the plaintiff pursuant to a 'Guarantee/Parking of the Machines'. Thus the status quo would lie with the machines remaining with the first defendant pending determination of the matter at full trial.

[17] If the injunction is granted, it will effectively put an end to the matter without a trial and deprive the defendants their right of trial. The defendant's submitted that the machines were to be parked with the first defendant for a minimum of two years with the sole intention that the terms of the JVA be complied with and as security for the debt owed by the plaintiff to the first defendant. It was not an agreement for rental as pleaded.

[18] The defendant's further submitted that the claim for rental is also an afterthought to pressure the defendants as the guarantee/parking of machines only provide:

> your good company may operate and use all or any of the Machines for the benefit of your good company subject to the rental fee to be paid to us: ...

[19] The defendant's submitted that the word used is 'may' and the plaintiff has failed to show that any of the machines were used for the benefit of the company. The plaintiff is incorrectly interpreting the terms of the 'Guarantee/Parking of Machines'.

ANALYSIS AND FINDINGS

[20] The nature of the remedy prayed for with respect to the return of the machines to the plaintiff is in the nature of an interlocutory mandatory injunction. It is mandatory because it requires the defendant to perform a positive act which in this case is the handing over of the machines to the plaintiff. The leading authority in respect of the right to obtain a mandatory injunction is to be found in the then Supreme Court decision of *Tinta Press Sdn*

Bhd v Bank Islam Malaysia Bhd [1987] 2 MLJ 192. Although it is a very brief passage, it correctly encapsulates the applicable principles when dealing with such applications. The relevant portion is contained in the judgment of Syed Agil Barakbah SCJ (as he then was) as follows:

> The discretionary power of the court to grant a mandatory injunction is provided by s 53 of the Specific Relief Act 1950 (Act 137). By judicial process, the power is extended to the granting of an interlocutory mandatory injunction before trial. *Such discretion however must be exercised and an injunction granted only in exceptional and extremely rare cases* as was held in *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok* [1975] 2 MLJ 109 and confirmed by the Federal Court in *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150. *The case must be unusually strong and clear in that the court must feel assured that a similar injunction would probably be granted at the trial on the ground that it would be just and equitable that the plaintiff's interest be protected by immediate issue of an injunction, otherwise irreparable injury and inconvenience would result (see Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271 *at p 273 and Shepherd Homes Ltd v Sandham* [1971] 1 Ch 340 *at p 349)*. Where the case is one of urgency, O 29 r 1(2) of the RHC 1980 allows an application to be made ex parte. We are satisfied that the learned Judge on the facts and surrounding circumstances of this case rightly concluded that this was an exceptional case where the court was justified in granting a mandatory injunction on an ex parte application before the trial. (Emphasis added.)

[21] Where a mandatory injunction is applied for, the principles enunciated in the case of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316 does not apply. In the case of *MBf Holdings Bhd v East Asiatic Co (Malaysia) Bhd* [1995] 3 MLJ 49, it was held:

> The ordinary *American Cyanamid* principles are not applicable in an application for a mandatory injunction. *In the case of a mandatory interlocutory injunction, for its grant there must be a high degree of assurance that at the trial it will appear that the injunction was rightly granted* (*Shephard Homes Ltd v Sandham* [1971] Ch 340; [1970] 3 All ER 402; [1970] 3 WLR 348; *Locabail International Finance Ltd v Agroexport* [1986] 1 All ER 901; [1986] 1 WLR 657). *This is far more than is required for a prohibitory injunction to which the American Cyanamid principles apply.* As put by LA Sheridan (at p 35):
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> > That may be no more than a way of saying that the balance of convenience is more often against a mandatory injunction than it is against a prohibitory injunction at the interlocutory stage because an interlocutory mandatory injunction is more likely to involve the defendant in expenditure, more likely to be the final determination of the dispute and more difficult to compensate if the defendant wins at the trial. (Emphasis added.)

[22] The relief by way of injunctions by and large emanated from the Court of Chancery in England and therefore has its origins in equity. Being an

A equitable remedy it is a matter of discretion whether such a remedy is granted and not as of right. The discretion of course lies with the court and must be exercised judiciously.

B **[23]** It is not in dispute here that the JVA has broken down. Hence the commencement of the suit brought by the plaintiff against the defendants for, inter alia, the return of the machines and the counterclaim by the defendant's, inter alia, for damages resulting from the breach of the JVA. It is not in dispute that the machines were only placed or 'parked' with the first defendant in good faith in consideration for the first defendant entering the JV with the plaintiff.

C

[24] There is also no dispute that the ownership of the machines were and remain in the ownership of the plaintiff. In their submissions before this court, the defendants contended that the machines were to be parked with the first defendant for a minimum of two years with the sole intention that the terms of

D the JVA be complied with and as security for the debt owed by the plaintiff to the first defendant. It was not to be an agreement for rental as pleaded.

[25] As the ownership of the machines are not in dispute and as the JVA has

E irretrievably broken down, the very reason for the machines remaining in the custody of the defendant's no longer exists. Although this would amount to granting part of the relief claimed in the suit filed by the plaintiff, and as the machines, by the defendants own admission, are not being used by them, it should be returned to the plaintiff. See *Datuk Johari Abdul Ghani & Ors v QSR*

F *Brands Bhd & Ors* [2007] 4 MLJ 19; [2007] 1 CLJ 85.

[26] Despite the contention of the defendant's that part of the reason for the parking of the machines was as security for the debt owed by the plaintiff to the first defendant, I do not find upon a perusal of the 'Guarantee/Parking of

G Machines' letter of 12 February 2014, any such term contained therein.

[27] The 'Guarantee/Parking of Machines' letter of 12 December 2014 further stipulates in cl (viii) that the plaintiff may at any time retract or withdraw the machines. The issue of preserving the status quo does not arise as

H the JVA has irretrievably broken down and therefore the machines are no longer required for its due performance. The machines also ought to be returned to the plaintiff to prevent further loss or damage. According to the plaintiff, two of the machines are missing and a police report had been lodged in this respect.

I

[28] To allow the defendant's to keep the machines would serve no purpose other than to perhaps act as leverage against the plaintiff if at all, in an attempt to settle the alleged debt. Further, as the plaintiff is the undisputed owner of the machines, it is fairly certain that the outcome at the trial of this action would

also result in the machines being returned to the plaintiff irrespective of the final outcome. This therefore brings this case within the category of cases in which a strong and arguable case exists for the return of the machines to them.

[29] Should the defendant's succeed at trial, any loss or damage, if at all, sustained as a result of the grant of this injunction to return the machines to the plaintiff, is one that can adequately be compensated by damages in any event. In this respect, the plaintiff had also given an undertaking as to damages.

[30] I therefore granted order in terms with costs of the plaintiff's application (encl 5) only for prayer (a) for the defendant's to return the machines to the plaintiff within one month from date of this decision. Prayers (b) and (c) were not allowed.

Order granted in terms with costs.

Reported by Afiq Mohamad